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**COURT OF APPEAL, FOURTH DISTRICT**

**DIVISION TWO**

**STATE OF CALIFORNIA**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ORTIZ ALVARO,

Defendant and Appellant.

E028487

(Super.Ct.Nos. FWV018914 &  
FWV020346)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown,  
Judge. Affirmed.

Miller & Associates and Carver Clark Farrow for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and  
William M. Wood, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

This appeal arises from two cases. In FWV018914, defendant Jose Ortiz Alvaro  
pled guilty to one count of carrying a loaded firearm by a gang member. (Pen. Code, §

12031, subd. (a)(2)(c).<sup>1</sup>) In FWV020346, a jury found defendant guilty of attempted murder (§§ 187, 664) and also found true the various gang and firearm use allegations (§§ 186.22, subd. (b)(4), 12022.5, subd. (a)(1) & 12022.53, subds. (b), (c) & (d)). Defendant admitted an on-bail enhancement. (§ 12022.1.) Defendant was sentenced to a total term of life with the possibility of parole plus 27 years to life. The sentencing on both cases occurred on the same day and defendant's notice of appeal listed both case numbers; however, defendant only challenges the judgment and sentence in the second case. Thus, our discussion will be limited to the second case.

### FACTS

In 1992, Damian Najera was 14 or 15 years old when he became a member of the South Sider or OVS (Onterior Vario Sur) gang, one of three related street gangs in Ontario. Najera's gang moniker was "Carnitas." OVS was the lowest rank of the three gangs. Around 1995, when he was 18, Najera was accepted into the next higher ranked gang, the Angelitos Negros. He was recommended for the move by his friend "Nano."

In 1996, Nano was killed by a member of a rival Pomona gang. Najera was paged by Nano two times on the day he was killed; however, Najera was unable to contact Nano. Shortly afterward, Najera received a page from Nano's family indicating there had been a killing and he learned of Nano's murder. Earlier, on the same day Nano was killed, another member of the gang was murdered. Najera felt he was getting "signs" from his gang members that he might be next, although he admitted he may have been paranoid from his

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

use of methamphetamine. In any case, without explaining himself to the gang, he left the state after Nano's murder.

Najera explained that a gang member cannot leave the gang "peacefully" and by leaving the state without explanation he "incriminated" himself for not being with Nano when he was killed. It was the "code" of the gang that he (Najera) would have to be killed and there was a "green light"<sup>2</sup> for any of the gang members to kill him.

Najera had to return to the state in 1997, but he stayed away from Ontario initially. When he returned to his mother's house in south Ontario in 1999, he stayed out of sight to avoid the gang members. In early 2000, Najera began to feel that the gang membership had changed enough through death and imprisonment that he could go out more.

On June 1, 2000, between 8:00 and 9:00 p.m., Najera was returning to his home to get his pager. His two acquaintances dropped him off at a neighbor's house three doors down from his mother's house. He told them to pull down in front of his mother's house where he would meet them. As Najera was walking in front of his mother's house, he noticed a car drive past and make a U-turn. Returning to his friends' car, they warned him about the car which had driven by. Najera, who was squatting down by his friends' car saw the other car pull up next to it. Najera made eye contact with defendant who was riding in the front passenger seat, approximately 10 to 15 feet away.

Najera had known defendant for seven to eight years; they had gone to junior high school together. Najera also knew defendant as a member of OVS. As defendant got out of

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<sup>2</sup> A "green light" means the gang wants the person dead.

the car, Najera went over the fence and fell to the ground in his mother's front yard. As he tried to get up, Najera glanced back and saw defendant with something shiny in his hand that looked like a gun. He heard the first shot while he was trying to get to the house. He heard five shots and was struck in the left leg by the fourth, which left his leg "dangling." Najera managed to drag himself to the porch and bang on the door.

Najera had surgery to place a rod that will never be removed in his left leg. He limps and has continual pain.

Officer Keith Volm described the Ontario gangs, the three divisions (OVS, Angelitos Negros, and Black Angels), and the gangs' signs and graffiti. The officer had known defendant for many years as an OVS gang member. Defendant has "Angelitos Negros" tattooed on the back of his head. Officer Volm was present when a search warrant was executed at defendant's residence. Defendant's bedroom and objects in the bedroom and house contained a variety of gang nicknames and other writings. Several photographs seized from defendant's bedroom depicted defendant with one or more Ontario gang members, making gang signs. The officer found a 50-cartridge box of .38-revolver rounds hidden under the dresser in defendant's bedroom. The box was missing five rounds.

In Officer Volm's opinion, defendant was a gang member who committed the charged crime to enhance his reputation in the gang, to enhance his gang's reputation, to intimidate members of the community, and to carry out crimes to promote the gang. The officer had learned about the "green light" on Najera soon after the killing of Najera's friend. Najera disappeared from the area right after the killing occurred. The gang believed Najera did not respond to his friend's pages.

### INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant complains that his counsel was ineffective for failing to object to hearsay evidence that he claims was crucial to establish the motive element of the attempted murder charge, and for failing to adequately investigate the case.

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) There are two components to an ineffective assistance of counsel claim. Defendant must show that: (1) his counsel's performance was deficient, specifically that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) he was prejudiced by his counsel's deficient performance, i.e., there is a reasonable probability that, but for counsel's failings, the result of the proceedings would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218, discussing *Strickland v. Washington* (1984) 466 U.S. 668, 684-685; see also *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *In re Avena* (1996) 12 Cal.4th 694, 721; *People v. Davis* (1995) 10 Cal.4th 463, 503.) If defendant fails to establish either component, his claim fails.

A. Failure to Object to Hearsay.

Defendant faults his trial counsel for failing to make a hearsay objection to Najera's testimony that "fellow gang members 'blamed' him for walking away from the gang after the murder of his only friend Nano, a member of an associated gang."

On direct examination, Najera stated that he was blamed for Nano's death. Najera explained what happened when he received Nano's page on the day he (Nano) was killed. When questioned about how he was blamed, Najera explained that he just left town, which resulted in incriminating himself.<sup>3</sup> On cross-examination, Najera explained that the day his

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<sup>3</sup> "[PROSECUTOR:] Were you blamed for Nano's death?

"[NAJERA:] Yes, I was.

"[PROSECUTOR:] How were you blamed?

"[NAJERA:] I wasn't there. I was at a motel clear across -- well, I was at the County Inn on Grove with three female friends located in Ontario and 60 and I received a page from my friend Nano prior to him being murdered, and I guess he was paging me to help him.

".....

"I received two pages from him, that's when I attempted to call him I couldn't get through. It was -- I guess you call it a sacred page and it was considered top priority for us Angelitos Negros and the VA's because my friend Nano was an AN with me but we used it commonly. . . .

".....

"[PROSECUTOR:] So how were you blamed by the gang for his death?

"[NAJERA:] That's what I would like to know. I kind of incriminated myself because they hit me hard. I had lost a lot of friends and I was just tired of it. I just wanted to go on, plus I had found a girlfriend whom I wanted to settle down with. I was just tired. . . . I just left so therefore I incriminated myself with them.

"[PROSECUTOR:] Okay. So by leaving and not explaining yourself to the gang, what?

"[NAJERA:] I made myself look guilty.

"[PROSECUTOR:] And if you're guilty for a brother gang member's death what happens to you?

"[NAJERA:] You die too.

"[PROSECUTOR:] How?

"[NAJERA:] However they can get you.

*[footnote continued on next page]*

friend was killed, another gang member was killed, and he was feeling a bit paranoid and thought he was getting signs from other members of his gang suggesting he was next.<sup>4</sup>

According to defendant, Najera's testimony amounted to hearsay evidence and the prosecutor should have brought in a gang member to testify "as to whether he or she believed Najera was 'blamed' for walking away from the gang." We disagree. Najera's testimony did not amount to hearsay. He was not relating any out-of-court statements of his fellow gang members when he testified that he was blamed for Nano's death. He was simply relying on his own intimate knowledge of the gang and its "code," the circumstances which occurred the day of his friend's death, and his immediate departure from the area

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*[footnote continued from previous page]*

"[PROSECUTOR:] But who would kill you?

"[NAJERA:] It would be up to the neighborhood to then take care of you for what we would call 'fucking up.'

"[PROSECUTOR:] Well, why would they have to do that?

"[NAJERA:] It's just the code.

"

".....  
"Green light.

"[PROSECUTOR:] What does having a green light mean?

"[NAJERA:] That means that you're a walking dead man as far as the neighborhood is concerned; that if they see you, to do whatever they can to being physical harm or take your life."

<sup>4</sup> "[DEFENSE COUNSEL:] . . . [¶] You said that you created the green light because you left and that incriminated yourself, correct?

"[NAJERA:] Yes.

"[DEFENSE COUNSEL:] If you stuck around there's a possibility that you could have explained what happened and not incriminated yourself, correct?

"[NAJERA:] Yes. But as I said, Freddie Estrada was murdered earlier that morning, and I may have been a little bit paranoid from the methamphetamine so I figured they were out to get me. I got signs from my fellow Angelito Negros that -- I got signs from them that made me feel as if I was next, as if they were going to attempt to do something to me. They gave me -- I had funny signs."

after his friend's death, in concluding that he had incriminated himself by leaving, would be blamed by the gang for the death, and would be killed.

Defendant's reliance on *People v. Stratton* (1988) 205 Cal.App.3d 87 is misplaced. In *Stratton*, the defendant's conviction of robbery of an ice cream store was reversed because trial counsel was inadequate in failing to object to the introduction of evidence about the circumstances of defendant's arrest, and to the introduction into evidence of a knife and hand grenade. (*Id.* at p. 93.) The appellate court found that an objection to such evidence would have been sustained because the evidence was only tangentially relevant to the robbery prosecution and its potential for prejudice was great. Since there was no satisfactory explanation for counsel's failure to object, the defendant was denied effective assistance of counsel. (*Id.* at p. 94.) The court further found that it was reasonably probable that defendant would have received a more favorable result if such evidence had not been admitted at trial. (*Id.* at pp. 95-96.) Unlike the facts in *Stratton*, here there was no meritorious objection.

B. Failure to Investigate.

Next, defendant contends his trial counsel was ineffective for failing to investigate the angle of the bullet, the distance between the gun and Najera, the type of gun used, whether defendant possessed the type of gun used, and for failing to challenge admissibility of the gang evidence and present evidence disputing the gang motivation for the crime.

"To establish ineffectiveness of counsel under article I, section 15 of the California Constitution, [defendant] must prove that counsel failed to make particular investigations and that the omissions resulted in the denial of or inadequate presentation of a potentially

meritorious defense. [Citation.] In particular, [defendant] must show that counsel knew or should have known that further investigation was necessary and must establish the nature and relevance of the evidence that counsel failed to present or discover. . . . Finally, it must also be shown that the omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make. [Citation.]” (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) “But it is black letter law that ‘if the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject [an ineffective assistance of counsel] claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel’s performance.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 434.)

Here, defendant fails to point to any evidence supporting his claim that defense counsel failed to investigate the various aspects of the case which he says were not investigated. Defendant has not demonstrated how his trial counsel knew or should have known that the firing angle of the bullet or distance between the gun and Najera would have been evidence favorable to him (defendant). The fact that no evidence was offered regarding the firing angle or distance does not establish a failure to investigate those issues, much less that such investigation would have produced admissible, exculpatory evidence. (*People v. Williams* (1988) 44 Cal.3d 883, 933; *Gallego v. McDaniel* (9th Cir. 1997) 124 F.3d 1065, 1077 [no ineffective assistance of counsel where defendant fails to show what additional evidence would have been discovered and how such evidence would have changed the result].)

Regarding trial counsel's failure to challenge the gang evidence, we find that such evidence was relevant to establishing defendant's motive for committing the crime, as well as the proving the gang enhancements. Defendant's reliance on *People v. Cardenas* (1982) 31 Cal.3d 897 is misplaced. In *Cardenas*, the gang membership evidence was offered only to show bias in the defendant's favor on the part of the defense witnesses because they were all in the same gang. (*Id.* at p. 904.) However, the probative value of the gang evidence was minimal and the evidence was cumulative and prejudicial. (*Id.* at pp. 904-905.) Unlike *Cardenas*, defendant's gang membership was quite probative, for purposes of showing motive and for proving the gang enhancements. Although defendant complains that his counsel should have presented evidence to show that he was motivated to commit the crime against Najera for some reason other than to further his gang, the fact remains that defendant is unable to show that such evidence existed. Further, defendant has not explained how the decision to withhold such evidence would have been tactically unreasonable in light of the defense that he (defendant) was not the shooter.

“As evidence of incompetency of counsel, the failure of the record to reflect such indicia of investigative effort . . . establishes neither an actual failure to investigate nor a basis for concluding that evidence supportive of [defendant's claims] was available and was not offered as a result of counsel's failure to discover it. A factual basis, not speculation, must be established before reversal of a judgment may be had on grounds of ineffective assistance of counsel. [Citations.]” (*People v. Williams, supra*, 44 Cal.3d 883, 933.)

## SUFFICIENCY OF EVIDENCE

Defendant challenges the sufficiency of the evidence to support the finding that the attempted murder of Najera was committed in furtherance of gang activity.

When the sufficiency of evidence is attacked, we must view the evidence in the light most favorable to the judgment, drawing all reasonable deductions from the evidence in the judgment's favor. We must accept all assessments of credibility as made by the trier of fact, then determine if substantial evidence exists to support each element of the offenses. (*People v. Carpenter* (1997) 15 Cal.4th 312, 387.)

The gang-benefit enhancement found in section 186.22, subdivision (b)(1) provides added penalties when a person is convicted “of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, . . .” Here, defendant does not challenge his membership in a criminal street gang. Instead, he disputes whether his crime was committed “for the benefit of, at the direction of, or in association with” his gang. Defendant argues that Officer Volm was the only “witness that speculated that there was a ‘green light’ out on Najera. . . . However, Officer Volm never states what he based this belief upon. He further admitted that it is possible that gang members go out on their own to commit acts without gang agreements.” According to defendant, the evidence amounts to no more than mere speculation. Contrary to defendant’s contention, the evidence and reasonable inferences drawn therefrom fully support the enhancement finding.

Najera, a former member of defendant’s gang, testified that the “code” of the gang required that he be killed for failing to assist Nano, and that it was up to every member of

the gang to carry out the killing when the opportunity presented itself. Officer Volm, the prosecution's expert witness, had four years experience working with the gang detail of the Ontario Police Department and twelve years working with gangs as a police officer. He opined that the attempted murder was committed to further defendant's own reputation, and to further the reputation of his gang, to create intimidation within the community, and to promote the gang. Officer's Volm's testimony was not speculation. It was factually supported expert opinion which may be relied upon in finding substantial evidentiary support for a street gang enhancement. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 [subject matter of culture and habits of street gangs meets the criteria for expert testimony]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484, fn. 3; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384.) The evidence was sufficient.

## ADMISSION OF EVIDENCE

Defendant faults the trial court for admitting evidence that he contends “had little probative value, yet created undue prejudice.”

### A. Defendant’s Moniker or Gang Photos.

Over defendant’s objection, the trial court admitted evidence of defendant’s moniker “Little Trigger” and gang photos. According to defendant, because there was sufficient testimony at trial regarding his gang status, the trial court erred in admitting evidence of his moniker and the gang photos because such evidence unduly prejudiced him.

“Because evidence that a criminal defendant is a member of a . . . gang may have a ‘highly inflammatory impact’ on the jury [citation], trial courts should carefully scrutinize such evidence before admitting it. In this case, however, the trial court reasonably concluded that the probative value of the evidence of gang membership was not substantially outweighed by its prejudicial effect.” (*People v. Champion* (1995) 9 Cal.4th 879, 922-923.) Here, the photographs corroborated the testimonial evidence and are admissible to assist the jury in understanding and evaluating the testimony. (*People v. Coddington* (2000) 23 Cal.4th 529, 633, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Even if we were to assume for the sake of argument that the trial court should have excluded this evidence, there is no reasonable probability that the trial court’s error affected the jury’s verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) This was a gang case which contained strong evidence of defendant’s gang membership apart from the

evidence of which he complains. Thus, we find any error was harmless. B. Najera's Leg Wound.

Defendant faults the trial court for admitting photographs of Najera's leg wound (including X-rays of the wound depicting the bullet, the fractured leg bone, and the rod placed in Najera's leg) contending that they had no probative value, they were redundant, and they were used to shock the jury and create substantial undue prejudice against defendant. However, as respondent points out, those photographs were admitted by stipulation and without objection. Having failed to object at the trial level, defendant is therefore barred from raising this objection on appeal. (*People v. Champion, supra*, 9 Cal.4th 879, 923.)

#### FIRST DEGREE MURDER

Defendant contends he "was charged with and convicted of first-degree attempted murder pursuant to [§§] 667/187 and 190.2(a)(22), to wit: attempted murder in furtherance of a gang activity." However, he argues that "the jury should not have found the gang enhancement to be true [as previously argued, and that w]ithout the enhancement, as a matter of law, [he] can't be convicted of first-degree attempted murder."

We reject this contention for the following reasons. First, we found sufficient evidence to support the gang enhancement allegation under section 186.22, subdivision (b)(4). Next, there was no allegation nor finding by the jury pursuant to section 190.2, subdivision (a)(22). And finally, we note that defendant has not submitted any legal argument or citation of authorities on this issue. Absent such briefing, we may treat the issue as waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th

764, 793 [where appellant makes a general assertion, unsupported by specific argument, court may treat the point as waived].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

HOLLENHORST

Acting P. J.

We concur:

McKINSTER

J.

GAUT

J.